No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD

Appellant

vs.

AMERICAN PACKING & PROVISION CO., a Corporation,

Appellee

Appellant's Reply Brief

Appeal from the United States District Court for the District of Idaho, Eastern Division

ALBAUGH, BLOEM, HILLMAN & BARNARD
Attorneys for Appellant
IDAHO FALLS, IDAHO

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD

Appellant

vs.

AMERICAN PACKING & PROVISION CO., a Corporation,

Appellee

Appellant's Reply Brief

Appeal from the United States District Court for the District of Idaho, Eastern Division

ALBAUGH, BLOEM, HILLMAN & BARNARD
Attorneys for Appellant
IDAHO FALLS, IDAHO

APPELLANT'S REPLY BRIEF

Appellee appears to generally predicate its argument in its brief on the theory that it has positively and definitely identified the so-called Wyoming steers as the subject matter of the contract in suit, and upon the further proposition that appellant's testimony was all perjury and the trial court justified in refusing to give any credence thereto. Appellee has offered little or no explanation or argument on many important matters, issues and questions arising from the evidence, which were pointed out by appellant in his prior brief. It argues only from so much of the evidence as it feels supports its position, and ignores everything which does not. In other words, it argues that the case can be determined on only part of the facts, and that the part favorable to it.

Appellant feels that the case can only be correctly decided when all the facts are taken into consideration. It accordingly becomes necessary for appellant to point out what appellee is ignoring or overlooking in its argument, whereby the same is unsound in many respects.

Inasmuch as appellee's theory of its having identified the subject matter of the contract with complete certainty runs throughout its argument, we will discuss this, and also the other charge that

appellant's testimony is all perjury, before discussing appellee's arguments on the individual numbered issues as they are set up in the prior briefs.

We pointed out in our prior brief certain facts and circumstances which we felt showed quite fairly that the Wyoming steers were not, and were never intended or understood by either party to be, the subject matter of the contract. We particularly pointed out that appellant undoubtedly owned these particular steers before and during the time the contract was being negotiated, yet Salerno admitted he knew appellant did not have any steers for the contract, and that he would have to acquire them. Appellee says nothing about this particular admission of its own agent.

We also pointed out that the Wyoming steers were of a different size and type than the parties wanted for the contract. Appellee says nothing about this.

We also pointed out and emphasized that several weeks after the contract was signed, appellant told Salerno he had fallen down on getting the steers for the contract, which Salerno has never denied. We noted that appellant's testimony in this respect is corroborated by the fact that Salerno agreed to reduce the number of steers to be delivered from 300 to 240. Appellee omits to explain this, for obvious reasons.

We also showed that it was more than a month after the contract was signed before appellee put up any money. Appellee gives no explanation of

that fact, although we stated, and the record shows, that negotiations were still going on, and during that time Salerno did not regard the deal as consummated, and he knew that appellant had not yet acquired steers for the contract.

Appellee's claimed identification of the Wyoming steers is apparently largely centered around the insertion by appellant of the words "O left hip" in the blank left in the contract, coupled with the fact that the Wyoming steers had been marked with paint daubed on by the bottom of a bottle or a stick.

We showed that the recital that the steers were on the ranch, branded in a certain manner, was merely a statement which both parties understood was something which would be true only at some future time. Salerno admitted he knew the steers would not be placed on the ranch until the following spring. Appellee makes no mention of this admission, but it follows that if there were no steers on the ranch, they could not be branded in any manner.

So far as this recital of the steers being branded in a certain manner is concerned, there is nothing more sacred about it than the recital that the $3,000 had been paid. Appellee says it is not unusual for parties to put such a recital of payment in a contract when in fact it is understood it will not be paid until a future time. We agree. Neither is it unusual for parties to insert other recitals which are understood to express the intention of the parties as to what will take place, although they are in form

statements of existing facts. This particular recital about the steers being on the ranch, branded in a certain manner, is on exactly the same legal basis as the recital that the down payment had been made, and, under well established rules of law, evidence to show the actual facts in either case should have been admitted. (22 C.J. 1233. Kay v. Spencer, 213, Pac. 511; Crandall v. Willig, 46 N.E. 755.)

We think the attempt to call this smear of paint a "brand," within the meaning of the word as used in the contract, is more than a little ridiculous. The manner in which the paint was applied is in the record—by dipping the bottom of a bottle in green paint and then applying it on the steer. The purpose of putting it there was also shown—to mark the steers for temporary identification while the steers were being moved. From the time the contract was signed until the time for delivery was nine or ten months. This mark would stay on the steers at the most for two or three months. It would be utterly useless to identify the steers at the time of delivery under the contract.

Certainly this much is established by the record—when Salerno called at appellant's ranch and made demand for delivery, none of these Wyoming steers showed any evidence of an "O" brand on the left hip, by paint or otherwise. They did wear brands, but none were "O" brands. Salerno himself said he could not claim any of the Wyoming steers because they did not bear the brand called for in the contract.

(Rec. p. 130-131). The brand inspector, J. J. Smith, testified he never saw an "O" brand on the left hip of any of these Wyoming steers at any time. (Rec. page 44)

The term brand has a well understood meaning among cattlemen. It is ordinarily a mark applied by using a hot iron, or acid. It is a permanent mark. Webster's International Dictionary says, "a mark burned into anything by its owner as a means of identification, as upon a cask or cattle." As a verb, "to burn or impress a mark upon, with a hot iron, as to **brand** a steer."

In Johnson v. State, 1 Tex. App. 333, the court had occasion to define the word, and held that under Pasch. Dig. art. 4659, providing that no brands, except such as are recorded, shall be recognized in law as any evidence of ownership, "brand" does not include marks, and the prohibition is not applicable to marks. In Churchill v. Georgia R. & Banking Co., 33 S. E. 972, it was held that "brand" indicates some figure or device burned on the animal by a hot iron, a means of identification, commonly used on animals. These definitions are but what is commonly understood by the word in a livestock country. There are ways of branding steers other than by using a hot iron, but the word necessarily implies a permanent mark of some sort. In ordinary range practice, paint is never used for anything except a temporary means of identification while livestock is being mov-

ed along the stock trails, just as was done in this case.

The basis of appellee's charge that all of appellant's testimony was false and untrue is closely connected with, and arises out of, this claimed identification of the Wyoming steers as the subject matter of the contract, as appears from pages 16 and 17 of appellee's brief. Appellee says that at the time the contract was signed, appellant had steers branded O on left hip. This necessarily assumes that the paint mark can be called a brand, and we maintain this cannot reasonably be done. Appellee says that appellant referred to these steers as "the best steers he ever fed," obviously referring to his letter of November 3, Exhibit 2. This assumes that the letter referred to the Wyoming steers, but we say this is not the case. We think it is obvious that the letter referred to the Peterson steers at Jackson, Montana. Appellee carefully avoids mentioning that weeks after this letter had been written, and before any money was paid, Salerno was told by appellant that he had fallen down on getting steers for the contract. Appellee also fails to note that the reduction in number was made long after this letter was written for the obvious reason that appellant had so fallen down on getting the steers he had expected to get, and which he belived he was getting when he wrote the letter. We believe appellee should give fair consideration to these things and give some reasonable explanation of them before it can charge appel-

lant with perjury.

To charge any witness with perjury is a most serious charge and should rest on a most substantial basis. We will refer to the other matters upon which appellee claims it can make such an accusation in answering appellee's brief on the separate points in the order in which they appear and are numbered. We say here, however, that appellee simply ignores vital, established facts in making this charge of perjury. As a result, the charge is without merit.

I

Issue of Conditional Delivery

We will take up the points urged by appellee as justifying the trial court in precluding appellant from showing that he did not have the steers covered by the contract at the time of the signing thereof.

(1) Appellee says that because appellant signed the contract which recited that he had the steers, and inserted the brand description, he acknowledged having the steers, and it would tend to vary the terms of a written contract to allow him to show that such recitals were not true. We think we have correctly outlined the law relative to such cases in our prior brief. We think the record amply supports our statements that both parties fully knew and understood that the steers would not be put on the ranch for several months. It is unnecessary to repeat what we have said in our prior brief on the

law and the facts. We would add that we think it is a rule of general application that it is always competent to show the intention of the parties to a written contract by showing the surrounding facts and circumstances. The cases we cited show that conditional delivery can always be shown by parol, anything in the contract to the contrary notwithstanding, because such evidence goes to the existence of the contract, not to its terms. It is also well established law that mere recitals of matters of fact in a contract, not being of a contractual nature, may be contradicted. 22 C. J. 1233. As was said in International Trust Co. v. Palisade Co., 153 Pac. 1002, "Not every statement in a deed or contract binds parties to it by way of estoppel. To render a statement effective as an estoppel it must appear that it was made of some matter which is thus settled as a fact. A recital as a rule does not raise an estoppel. To give it that effect, it must show that the object of the parties was to make the matter recited a fixed fact. Hays v. Askew, 50 N. C. 63. Recitals which are general and not contractual, merely descriptive, are not binding. Muhlenberg v. Druckenmiller, 103 Pa. 631. To be binding the recital must be of matter material to the purpose of the instrument. Reed v. McCourt, N. Y. 435. The rule does not extend to that which is mere description, or an averment which is not essential and the doctrine has always been construed with great strictness."

"A mere statement of fact, known by both parties

to be untrue, gains no sanctity by reason of being stated in writing, and may be disproved." Kay v. Spencer, 213 Pac. 731; Crandall v. Willeg, 46 N. E. 755; Corbett v. Cronkhite, 87 N. E. 874.

As we have pointed out in our previous brief, the manual delivery of the contract was presumptive only as to actual delivery, and the presumption is rebuttable. Salerno did not regard the contract as final when he wrote his letter of November 15, 1946, Exhibit 15, to appellant. The fact that a change was made in the number of steers to be delivered more than a month after the contract was signed strongly tends to rebut the presumption of unconditional delivery. Appellee does not discuss these items.

(2) Appellee's second point rests entirely on the letter written by appellant on November 3, 1946, Exhibit 2. We have discussed the facts and circumstances which show that this letter referred to the Peterson steers at Jackson, Montana, but we note that appellee avoids any discussion thereof, or of the facts (1) that Salerno was told that appellant had fallen down on getting these before any money was put up by appellee, and (2) the contract was either substituted or modified long after this letter was written.

(3) Appellee's third point seems to rest on the testimony of Orland Robertson that the paint mark made an "O" brand. If this was a brand, why did the brand inspector, J. J. Smith say there was no

O brand on any of the Wyoming steers? Why did not Salerno claim these particular steers when he made demand on appellant for delivery if they were O left hip steers?

(4) Appellee's last point concerns the testimony of said J. J. Smith. It is true that Smith did at first testify to the effect that appellant told him in August, 1947, that the steers under contract to appellee were on the ranch. However, it is necessary to consider all of Smith's testimony to see whether any such statement was actually made. We invite the court's attention to his cross-examination, pages 79-83 of the record. When we take all of his testimony together, we find that he himself admits his memory of the conversation was very vague, and the substance of the conversation appears quite differently. The general effect of the conversation seems to have been that Smith knew there was a controversy between appellant and appellee over a contract, and that appellee was claiming some right in the nine head of cattle which appellant or his son had obtained from Bruce Porter. Appellant undoubtedly assured Smith that these nine head had nothing to do with the contract. They then talked about whether or not appellee claimed any right in the other cattle appellant had on his ranch, and appellant very possibly did say that he had offered them to appellee, or would offer them, in settlement of the controversy. As we say, Smith was very vague, and

but little can be gathered from his testimony.

These seem to be all of the points which appellee urges as proving the Wyoming steers were the contract cattle. Appellant's position is that while these facts, standing alone, might tend to indicate that was the case, it is necessary to consider all the facts.

Appellee, on page 17 of its brief, argues that the parol evidence which appellant sought to introduce to show conditional delivery would tend to vary the recitals in the written contract. We have covered this phase of the situation in our prior brief. Appellee admits our statement of the law is correct, claiming only that where there is anything in the contract to the contrary, the parol evidence is inadmissable. An examination of the only case cited by appellee, Hanrahan-Wilcox Corporation v. Jenison Machinery Co., 73 Pac. (2d) 1241, shows that it does not go to the point claimed. That case grew out of a contract for the rental of a road grader, the contract providing for a 6½ month term. After receiving the machine and using it for 90 days, the lessee became dissatisfied with its performance and returned it to the defendant. Defendant had demanded and plaintiff had refused payment of the rental. Thereupon plaintiff brought action to have the court declare the written contract never became effective on the ground that contemporaneously with its execution, the parties had orally agreed that the written contract was not to be effective unless and until plaintiff was satisfied, after trial, with the perfor-

mance of the machine. The alleged oral agreement would simply tend to delay the effective date of the written agreement, and it was held it would be inconsistent with the provisions in the agreement that rent began on the day of shipment of the machine to plaintiff. This case is not unusual, nor does it differ with the case cited by appellant. Actually, in principal, what was contended for did not constitute a condition precedent, but was something more in the nature of a condition subsequent. Evidence of a condition subsequent claimed to have been agreed on prior to or contemporaneous with the execution of a written contract is never admissible. Such a condition does not go to the existence of a contract as a valid, subsisting agreement. The distinction is pointed out in 20 Am. Jur. 957, where, in discussing evidence of conditional delivery, it is said:

> "It is frequently very difficult to distinguish between evidence of the character now under consideration and evidence which falls within the condemnation of the so-called "parol evidence rule." A test which is commonly applied is whether the evidence shows a condition precedent or a condition subsequent. In the former case, the evidence is admissible, in the latter case, not. The condition precedent must be a condition precedent to the instrument becoming a valid obligation, and not merely a condition precedent to the performance thereof if the

evidence is admissible."

On page 19 of its brief, appellee says appellant contends that the recitals in the contract that he then owned the steers branded O left hip was a mistake. We do not so contend. We say, as we have always said, that this was a mere statement or recital of what the parties intended would be the fact at a future time, but that it was understood by both that it did not represent present facts.

Appellee, on page 21 of its brief, gets closer to the real point in issue. It says that if there was error in excluding this evidence, it would not be reversible, because it is apparent from the trial court's memorandum decision that the trial court would not have believed anything appellant testified to anyway.

The situation seems somewhat mindful of the justice of the peace who said he would not hear any evidence on the part of the defendant in any of the cases tried before him, because it only tended to confuse him.

Whether the trial court would believe any of appellant's testimony or not, if it was competent it was admissible, and appellant was entitled to have it in the record, not only for the trial court's consideration but for any appellate court to consider. We feel, as we have stated, that it really was because the trial court did not hear all the facts, and this evidence in particular, that it took the attitude it did toward appellant's testimony. We think if all the facts and circumstance had been properly

before the court, showing what the parties really intended by this contract, appellant's testimony would have been well substantiated by these facts, and the trial court would have felt much differently about the credibility of appellant's testimony. Moreover, as we have said, under Idaho law, a trial court may not arbitrarily or capriciously disregard the testimony of a witness, even though the witness be a party, unimpeached by any of the modes known to the law, if such testimony does not exceed probability.

Appellee's conclusion that the excluded evidence, even if admitted, would not change the result which the trial court reached, is based solely on this theory that the trial court was not going to believe anything appellant said. If that is true, nothing could more clearly demonstrate that appellant did not have a fair trial, nor could it be more evident that the error was highly prejudicial.

On the question of waiver of conditions precedent, appellee presents the following points, which we will consider in the order given by appellee:

First, appellee claims that the finding of waiver is supported by appellant's acceptance and retention of the $3,000.00. This presupposes that the payment was made on the particualr contract in suit. The draft by which the payment was made, however, shows on its face that it was not on this particular contract, but on a modification thereof or on a sub-

stituted contract, made several weeks later. Appellee neglects to explain this.

As second and third points appellee says by Exhibts 11 and 12, appellant acknowledged the contract. Appellant has never denied that an agreement or contract was made between the parties, but he does contend the contract in suit does not represent that agreement. The terms and conditions of that subsequent agreement which was finally reached are not before the court in this case, and it is impossible to tell what they were to the extent that any liability could be predicated thereon. We think it is obvious that appellant's letters referred to the agreement the parties did make, but even if it be construed that he was referring to the contract in suit, it was nothing more or less than an attempt to settle a dispute by friendly means. Considering all the circumstances under which those letters were written, appellant's reference to the contract is far short of any admission or recognition of the actual validity of the contract. We might call attention to appellant's statement on page 158 of the Record that he thought the contract had been cancelled, but appelee was insisting on performance of it. Merely because appellant referred to a contract which was in dispute certainly does not constitute any admission of its validity, particularly where the purpose of the letter was to effect a settlement of that dispute. Certainly it does not constitute evidence to support a waiver of any conditions.

II

Weight and Grade

Appellee commences its argument on this subject on page 25 of its brief. It undertakes what it calls a review of the evidence. It argues that appellant's testimony that he did not have any O left hip steers at the time the contract was signed is untrue. The argument is obviously based on its theory that the paint mark can be called a brand, which we think is erroneous.

The next point is that appellant said in his letter, Exhibit 2, that the steers were of good quality. As we have said, this letter did not refer to the Wyoming steers, but to the Peterson steers at Jackson, Montana. Likewise, appellant's testimony which appellant quotes on pages 28-29 of its brief referred to the Peterson steers, as is obvious from his testimony on page 111 of the record.

The real point in issue, however, on this subject of quality, is completely ignored by appellee. No matter what representations or statements appellant may have made about the quality of any steers he had or expected to get in October or November, 1946, their quality ten months later would depend on many factors, and there is no evidence of such factors in this case. Moreover, the contract itself did not require delivery of any particular grade, and actually contemplated and provided for different grades. Appellee does not discuss the real issue, nor does it answer our charge that the trial court, by

its findings, undertook to, and did, write something into the contract above and beyond what the parties provided when it said the steers had to be of good quality.

Appellee attempts to distinguish the case of Mason v. Ruffin, 130 So. 843, by saying that case referred to unidentified steers. Appellee therefor relies entirely on its theory that it positively identified the Wyoming steers as the subject of the contract. If this premise is unsound, as we insist it is, the case cannot then be distinguished from the cited case.

On the subject of weight, we will briefly examine the points which appellee says supports the trial court's findings thereon. It says, first, that appellant himself established the minimum weight at about 900 pounds. It then says it is proved by other evidence that he underestimated. All that is necessary is to show just what steers appellant was testifying about when he gave his estimate of this figure. The record shows, pages 112-114. They were the Peterson steers, and as they were never obtained, we cannot see where testimony as to their estimated weight has any force or value in proving what weight steers he would have to deliver under this contract. The most this testimony would tend to prove is that appellant could have delivered steers which averaged 900 pounds, but it does not support any claim that they had to weigh that figure, or any other figure. It might tend to show that 900 pound steers would

be acceptable under the contract, but it does not show that the contract required 900 pound steers.

The next point urged is that Robertson testified the steers he was feeding for appellant would, under normal feeding conditions, have weighed from 925 to 1000 pounds by August or September of 1947. As appellee points out, the steers Robertson was feeding were the so-called Wyoming steers. The record shows that they actually turned out to weigh from 845 pounds (ninth item, Exhibit 5—Record, p. 67) to over 1285 pounds (average of 7 steers on Exhibit 6—Record, p. 68). Appellee has calculated the average of all of these same steers as being 1046 pounds. As we have said, the use of an average of a herd showing such a wide variation in individual animals would be unjust and unreasonable as a means of showing what the contract required. Appellee does not deny this, nor does it point out wherein said average figure would support a finding of 950 pounds.

Appellee's arguments on weight are therefor unsound. It's first point that appellant fixed the weight at 900 pounds proves nothing, because appellant was testifying about an entirely different herd. The second point, Robertson's testimony, can be judged by its accuracy as shown by comparing his estimates with the actual figures. On the third point, the Wyoming cattle were not the contract cattle, and as to them, the use of an average is patently out of reason because of wide variation.

III

Abandonment and Substitution

Appellee attacks this issue first by referring to the allegations of the amended answer. We think the issue is properly raised. Paragraph V of the pleading alleges that because of the failure to pay the down payment called for by the contract, there was a failure of consideration, and the said contract was rescinded and abandoned. Paragraph VI alleges that the parties thereafter entered into a subsequent parol agreement. This is, to our view, both consistent and proper, and in accord with what the facts show was the actual case.

The evidence shows that the $3,000 down payment was not made when the contract was signed, and when it was paid, it was paid on a new and different undertaking. We do not maintain that the failure to pay the $3,000 at or near the time the original contract was signed was the only reason why the original contract was rescinded and abandoned by the parties, but it was one of the reasons. Appellee gives no explanation of why it was not paid upon appellant's request as made in Exhibit 2, nor does it explain why the draft showed on its face that a different deal had been made in the meantime.

Appellee seems to question our use of the word "rescind," and says we have not made out a case of recission, implying that recission implies or requires notice of recission and restoration of status quo, and says that recission is a method whereby one

party to a contract may, under certain circumstances, relieve himself of his obligation. Our use and understanding of the term is as is stated in 12 Am. Jur. 1011, where it is said:

> "Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However, to have the effect of discharging a contract, an agreement of recission must be a valid agreement. Two minds are required to change the terms and conditions of a contract after it is executed . . . If, however, the parties agree to rescind the contract and each one gives up the provisions for his benefit, the mutual assent is complete and the parties are then competent to make any new contract that may suit them."

Appellee's next point is that the trial court simply did not believe appellant's testimony. We have discussed the right of the trial court in that respect, and need say no more about it here.

Appellee next seeks to make something out of the claim that there are inconsistencies between the original answer and the amended answer in this case. The very purpose of making amendments to pleadings is to have them conform to what the pleader expects the facts will show on the proof in the case. Under certain circumstances, statements in former pleadings are sometimes admissible as admissions, but we believe the rule is universal that an abandoned or superseded pleading is, to all intents and pur-

poses, out of the case and any inconsistencies or admissions therein can be taken advantage only by placing the former pleading back in the case by introducing it in evidence.

Shipley v. Reasoner, (Iowa) 54 N. W. 470.
Brisco v. Met. Ry. Co. (Mo.) 120 S. W. 1162
Woodsworth v. Thompson, (Neb.) 62 N. W. 450

The original answer was not introduced in evidence, and is not part of the record. We feel it unnecessary to devote any time to arguing about any inconsistencies therein. If there are any such inconsistencies, as claimed by appellee, they are caused by the ineptitude of appellant's counsel, and appellant should not be prejudiced thereby. The reason for requiring former pleadings to be introduced in evidence before any claimed admissions or inaccuracies therein may be taken advantage of, is of course that any admissions or former statements are open to explanation, and unless they are placed in evidence, there is no way to offer such explanation.

Appellee says the record provides the complete answer to appellant's contention that his testimony of abandonment was uncontradicted, based on four points. Taking the first point, appellee says when appellant attempted to return the $3,000, it was accompanied by a letter acknowledging it was first paid to appellant **under the contract.** The letter referred to is Exhibit 8. We answer this by asking this court to look at the Exhibit. It says **purported** contract. It is to be remembered that at the time

this letter was writen, appellee was claiming it had a contract for 300 steers, and had already demanded delivery of that number. The letter obviously referred to the claim appellee was then asserting—its **purported** contract.

We have already discussed appellee's next two points, which have to do with Exhibits 11 and 12. As we said, there was a dispute. Appellant is only a cattle rancher, and could hardly be expected to use the same terms or language of a lawyer. He did not qualify his language by the use of the word "purported" or such similar qualification. Under the circumstances, thinking the contract had been cancelled but finding appellee insisting on it, the meaning of his language is apparent, and he was certainly not admitting the validity of the contract.

Appellee's remaining point is that appellee, by repeated demands for performance, negatived any inference that appellee considered the contract as abandoned. Appellee's demands were for the delivery of 300 steers, and nothing else would do, although appellee well knew it had no real right to that number. We are unable to see where appellee's improper demands prove anything about the contract, or that such demands in any way negative appellant's assertion that his testimony was uncontradicted in these particulars. There was one clear way by which appellant's testimony about abandonment of the original contract could have been contradicted, and only one way—by putting Louis Salerno on the wit-

ness stand, which appellee did not do. The presumption is that appellant's testimony was true. The inference why appellee did not have Salerno contradict it is obvious.

Commencing on page 40 of its brief, appellee discusses appellant's argument that when the contract was shown by the evidence to have been materially modified or superseded, appellee, having declared on the contract as originally written, cannot recover. Appellee's argument is that appellant's contention is unsound because it was from evidence adduced by appellant that the facts were disclosed. Appellee well knew, as it was advised by the amended answer, that the original contract had been changed. It sought to conceal this, however, but it did not entirely succeed. The full terms and conditions of the subsequent agreement, however, are not before the court, and in such state of the evidence, we do not think the trial court could rightly predicate any liability on the subsequent agreement. Even after the facts had been disclosed, at least enough to show that there was a subsequent change, appellee did not change its position, but remained standing on the original contract. We take it the door was wide open for appellee to go ahead after the change had been shown and prove what its rights were under the subsequent agreement. Instead, it sought and continued to seek to recover on a contract which the parties had mutually repudiated. The rule for which ap-

pellee contends can hardly apply in such circumstances.

IV

Right to Impeach Salerno

As may be seen from appellee's entire brief, it largely rests its case on the assumption that it has positively identified the subject matter of the contract. It is apparent from the manner in which this contract was negotiated that Salerno and appellant alone knew the true facts, and it was for this specific purpose that appellant called Salerno—to get at the facts.

The identity of the subject matter was one of the vital issues in this case. There were recitals in the contract which bore on that issue, but they were not true statements. Salerno knew they could not possibly be correct, and as he was the person who had them put there, his purpose in putting them there could be shown. He had previously testified on the taking of his deposition. We invite the court's attention to his testimony, commencing on page 127 of the record. He began to evade the questions, and knowing what he had said on his pre-trial deposition, appellant sought to use the same by way of impeachment to show what he had in mind when he put these recitals in the contract.

Appellant was not, as stated by appellee, trying to discredit the witness and then get the facts from a discredited witness. It had at least some of the facts in his deposition, and was trying to use the de-

position to see that he told the truth about matters which were known to him alone. The trial court's ruling foreclosed appellant from pursuing the entire inquiry.

Under the rules, we think appellant was entitled to have these facts disclosed, and the trial court's ruling was accordingly prejudicial error. We would refer the court to our prior brief on the whole subject.

V

Appellee makes a serious misstatement on page 49 of its brief. It says, "However, good quality steers were appropriated to the contract as found by the trial court and supported by the evidence." We find no such finding of appropriation by the trial court. Even in its memorandum decision, the trial court said, referring to the Wyoming steers, "However, title to them had not passed, they were not legally dedicated to the contract, and the defendant was free to substitute other steers of good quality."

Appellee's argument on this issue of damages continues on the theory that the Wyoming steers were the contract steers. We have discussed this, and will not repeat our contentions.

Appellee then goes on to claim that the same ratio of damages at 7½ cents per pound would hold good under the contract formula fixing the purchase price, regardless of grade. This might or might not be true, as will be seen by reference to the formula. It would depend entirely on the difference between

the buyer's market price per pound between A grade and the actual grade of the steers. There is absolutely nothing in the record one way or another to show what the buyer's market price at the time of delivery was on any grade. We cannot compare the contract prices with prices wholly within appellee's knowledge on something which appellee offered no evidence. Appellee says that the spread between contract price and market price for low grade steers would be the same as for higher grades. Where is there any evidence to sustain such a statement? If we were to concede that the contract required all the steers to be of A grade only, there is some evidence which would sutsain the 7½ cent figure, but the contract does not so require. There is no evidence as to the difference on other grades, so no finding to that effect can be sustained.

In discussing the offers made by appellant, appellee, as appears on pages 51 and 52 of its brief, refers only to the offers made by appellant to turn over the Wyoming steers to settle the dispute between the parties. We have never contended that such offers were sufficient, and our brief so shows. Appellee again resorts to using only part of the facts. It says nothing about the real offer to perform. In his letter of August 22, 1947, Exhibit 11, appellant, after offering the Wyoming steers at a higher figure than the contract price, said, "if you cannot use them at that I will put in other cattle by First of Oct. and get rid of these." It is perhaps necessary to consider

this in relation to appellant's testimony about his conversation with Salerno, which took place the last part of August or first part of September, 1947, not as appellee says, the last part of September. (Record, pages 157-158). Appellant testified that he offered to go to Denver and buy steers and sell them to appellee for 17½ cents, the contract price. Appellee says Salerno denied this, but we do not think his testimony can be so construed. He did deny he received any offers other than the Wyoming steers at more than the contract price, but at the time he testified, appellant had not as yet given any testimony about his offer to go to Denver and get other steers on the market. Salerno may not have regarded this as an offer, but he did not thereafter go on the stand and deny what we claim is appellant's offer to perform.

To our mind, Salerno's so-called denial should not have been admitted in evidence at the time he testified. He was being cross-examined on matters wholly outside the scope of his direct examination, and he was allowed to answer over proper objections.

In any event, we think the record shows appellant did offer to perform, both by letter and orally to Salerno.

VI

Performance by Appellee

The contract called for a $3,000 down payment. Appellee admits that this payment was not made at or near the time the contract was signed, the recital

in the contract to the contrary nothwithstanding. Appellee makes no explanation of the three important facts which we said should be considered in determining whether or not appellee performed under the contract. These things, which appellee so pointedly ignores, are: (1) Why did appellee delay in making the payment for several weeks, at a time when the seasonal run or market for feeder steers was in progress, knowing that appellant was to purchase steers for the contract on that market?

(2) Why did Salerno enter into negotiations with appellant after the contract was signed, which resulted in a material change in the deal?

(3) Why did Salerno have the $3,000 draft show on its face that it was for a different number of steers than the number called for on the original contract?

We have herein and in our prior brief discussed the implications arising from these matters, but appellee ignores them and makes no answer to these questions.

Appellee's entire argument that it performed the contract is based on the retention of the proceeds of the draft and on the claim that appellant was recognizing the contract as valid.

The record shows what the draft was given for. It was not on the contract as originally written. Not enough of the subsequent dealings between appellant and Salerno are shown to tell just what they agreed upon, but, as we stated in our prior brief, appellant testified directly that he accepted the draft on an

agreement to try to get steers during the winter. No doubt he was very negligent in not returning the money as soon as he found himself unable to get the steers during the winter. Under such circumstances, he would be liable for interest until he returned the money, or at least offered to return it. Incidentally, the trial court charged him with interest on this $3,000.00 even after the date he returned it, which, although a minor matter, was erroneous.

So far as appellee's argument is concerned, we say that it ignores the vital points which must be taken into consideration. As to the things which it claims supports its argument, we have shown that Exhibit 8 refers only to a "purported" contract. We have discussed appellee's arguments pertaining to Exhibits 11 and 12.

VII

Denial of Appellant's Motion to Dismiss

We agree that appellee has correctly stated that the issues raised by the motion go to the sufficiency of appellee's evidence to make out a prima facie case of recovery. We have discussed our interpretation of the evidence. We think the facts which we pointed out and which appellee has failed to discuss are the things which show wherein appellee failed to make a prima facie case.

VIII

Fairness of the Trial

We are astounded at appellee's attempt to prejudice this court by charging that we have attempted to reflect on the judicial integrity of Judge Healy.

We have the greatest respect for Judge Healy and for his judicial attainments. We know that Judge Healy, like all other judges, is a human being, and, like other human beings, may commit error. Judge Healy, we think, would be the first to admit that. The very purpose of appellate courts is to correct the errors which so often can and do creep into trials.

We think we have but followed the practice used by all lawyers on appeals in asserting that appellant did not get a fair trial. Particularly is this true where the exclusion of evidence is the basis of the errors charged. When material, competent evidence, properly admissible under the rules of trial practice, is excluded, a fair trial does not result, and it certainly is no reflection on the judicial integrity of the trial judge to say so on appeal.

We would reverse the order in which appellee states our contentions as to why we did not get a fair trial. Our position is this—the trial court excluded evidence which should have been admitted, which led to the court's adopting a wrong theory of the case, based on only part of the facts. In turn, limited as it was, the testimony of the appellant did not appear credible to the court, and the court took a somewhat arbitrary attitude and rejected it. We

feel that if all the facts were before the court, it would throw an entirely different light on the case, and appellant's testimony would appear far more worthy of belief.

We think the errors in this case arose because of appellee's rather successful concealment of the true facts. We feel that on a new trial, under proper instructions from this court, all the competent, material evidence will be properly received and weighed, and that the errors which we have complained of will not again occur.

Respectfully submitted,

ALBAUGH, BLOEM,

HILLMAN & BARNARD,

Attorneys for Appellant.